IN THE

Supreme Court of the United States

OCTOBER TERM 1993

No. 93-289

JOHN H. DALTON,
SECRETARY OF THE NAVY, *ET AL.*

Petitioners,

v.

ARLEN SPECTER, *ET AL.*,

Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF AFFIRMANCE

Pursuant to Rule 37.4 of the rules of this Court, Public Citizen seeks leave to file the attached *amicus curiae* brief in support of affirmance.

Public Citizen is a nonprofit corporation with 160,000 members that has worked since 1971 for the enactment and enforcement of strong health, safety, consumer protection, and open government laws. It has brought numerous

lawsuits to ensure federal agency compliance with statutes requiring openness, public participation, preparation of public reports, and governmental accountability. Public Citizen's ability to bring a variety of cases to enforce its members' rights may be affected by the outcome of this case.

Public Citizen also has a longstanding interest in ensuring federal agencies' compliance with their obligation to prepare environmental impact statements on their proposals, as required under the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332. However, the Court of Appeals for the D.C. Circuit recently embraced the logic that the government urges the Court to adopt here and held that judicial review of a federal agency's refusal to prepare an environmental impact statement, where the President has the ultimate authority over the substantive decision, was not available under the Administrative Procedure Act. *Public Citizen v. Office of the U.S. Trade Representative*, 5 F.3d 549 (D.C. Cir. 1993), *cert. pending*, No. 93-560. Public Citizen seeks to file this brief because the Court's disposition of this case may have a direct impact on the reviewability of NEPA claims, including those at issue in *Public Citizen*.

Public Citizen also seeks to file this brief to demonstrate how this case should be resolved in a way that will not eliminate judicial review for whole categories of NEPA obligations that have consistently been reviewed by the courts in the past, as well as other similar obligations imposed on federal agencies by federal law. Although our views are generally in accord with those of respondents, we differ with respondents on the issue of whether a decision on the merits made by the President must necessarily be set aside as a result of an agency's violations of statutorily mandated procedures. The attached brief asserts that judicial review of an agency's compliance with statutory mandates is available, even though a violation of those mandates need not result in an invalidation of the President's decision.

Petitioners have consented to the filing of this brief. Respondents, however, have declined to consent because they disagree with our position on the merits.

Respectfully submitted,

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INTEREST OF AMICUS CURIAE

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STATEMENT OF THE CASE

A. The Statutory Structure.

The Defense Base Closure and Realignment Act of 1990 (the "Act"), Pub. L. No. 101-510, Tit. XXIX, 104 Stat. 1808, established a carefully crafted procedure for identifying and closing unnecessary military bases. First, the Secretary of Defense must employ notice and comment rulemaking procedures to establish the criteria that will be used to select bases for closure in each of three scheduled rounds of base closures. *Id.* § 2903(b). For each round, the Secretary must also prepare a force-structure plan based on an assessment of probable national security threats. *Id.* § 2903(a). The Secretary is required to rely on the selection criteria and force-structure plan in making his base closing recommendations to the President. *Id.* § 2903(b)(2) & (d)(2)(B).

Second, the Secretary of Defense may make base closure recommendations for each round, but he must do so by publishing his recommendations in the Federal Register by April 15th of the base closing decision year (1991, 1993, and 1995). *Id.* § 2903(c)(1). The Secretary's recommendations must include a summary of the selection process and a justification for each recommendation. *Id.* § 2903(c)(2). Moreover, the Act directs that the Secretary consider all military installations equally, without regard to whether they had previously been proposed for closure by the Department. *Id.* § 2903(c)(3). Finally, the Secretary must make all information used in making his recommendations available to the bodies charged by the Act with reviewing his recommendations. *Id.* § 2903(c)(4).

Third, the Act establishes a Defense Base Closure and Realignment Commission, which is charged with reviewing the Secretary's recommendations and making its own base closing recommendations to the President. *Id.* §§ 2902, 2903(d). Specifically, after conducting public hearings on the Secretary's recommendations, *id.* § 2903(d)(1), the Commission must, by July 1st, transmit its own recommendations to the President. *Id.* § 2903(d)(2). The Commission may change the Secretary's recommendations, if it concludes that the Secretary deviated substantially from the force-structure plan and the selection criteria, as long as it explains its reasons for doing so. *Id.* § 2903(d)(2)(B) & (3). Commission meetings must be open to the public, except when classified information is discussed. *Id.* § 2902(e)(2)(A).

Fourth, by May 15th, the Comptroller General must also prepare a detailed analysis of the Secretary's recommendations and selection process. *Id.* § 2903(d)(5). That report must be transmitted to both Congress and the Commission. *Id.*

Fifth, the President has until July 15th to approve or disapprove, in whole or in part, the Commission's base

closing recommendations, with an explanation for any disapproval. *Id.* § 2903(e). If the President disapproves any of the recommendations, the Commission must give the President revised base closing recommendations by August 15th, which the President has until September 1st to approve or disapprove. *Id.* § 2903(e)(4) & (5).

Sixth, the President's decision may be certified and submitted for congressional review only if the President approves a set of the Commission's base closing recommendations in their entirety. *Id.* § 2903(e)(2), (4). Congress then has a limited period of time (no more than 45 session days) in which to enact a joint resolution disapproving the base closing recommendations in their entirety. *Id.* § 2904(b). If Congress does not take such action, then all of the base closing recommendations must be implemented. *Id.* § 2904(a).

B. The Proceedings in this Case.

This case concerns the base closing recommendations for the first round of base closures in 1991, which were approved by the President, and for which Congress failed to enact a disapproval resolution. Thereafter, this lawsuit was brought under the Administrative Procedure Act ("APA"), seeking to enjoin closure of the Philadelphia Naval Shipyard. Respondents claimed, *inter alia*, that the recommendation process actually used by the Commission and the Secretary of Defense violated the base closing statute.

The district court dismissed, but a divided panel of the Third Circuit affirmed in part and reversed in part. 971 F.2d 936 (1992). The court held that the President's ultimate decision -- whether to approve the Commission's base closing recommendations -- is unconstrained by the base closing statute and hence is committed to his discretion and unreviewable. *Id.* at 944-46. Similarly, it concluded that Congress intended to preclude review of claims that went to the merits of the Secretary's or Commission's

recommendations or of the force-structure plan. *Id.* at 950-52. In contrast, the court found no congressional intent to preclude review of claims that the recommendation process was illegal because the Secretary had failed to publish a summary of the selection process and the justification for his base closure recommendations, *id.* at 952, the Commission had failed to hold public hearings, *id.* at 952-53, and the Secretary had failed to transmit to the Commission and the Comptroller General all the information used in making his recommendations. *Id.* at 952.

According to the court, however, review of these procedural claims is limited in two respects. First, no judicial review is available until the President's decision becomes effective because of the Base Closing Act's tight timetables and the preliminary nature of the steps in the process prior to the President's decision. *Id.* at 945-46. Second, "[w]hether or not a violation receives a remedy is something that a court must determine through an exercise of its discretion . . . [and] [t]hus, judicial review does not mean that any technical defalcation will invalidate the package and require that the process be repeated from square one." *Id.* at 950.

This Court vacated and remanded the case for further consideration in light of its intervening decision in *Franklin v. Massachusetts*, 112 S. Ct. 2767 (1992). On remand, a divided panel held that *Franklin* does not affect the reviewability of respondents' procedural claims. 995 F.2d 404. The court held that, as distinct from the merits of the base closing recommendations, which it previously held are unreviewable, the courts could review claims that the Secretary or the Commission violated specific, nondiscretionary aspects of the statutory recommendation process. It reasoned that "the fact that [the President] played a role provides no justification for holding the process and the final executive action immune from review for compliance with mandatory procedural requirements of the Act." *Id.* at 411. Moreover, according to the court, any

deviations by the Secretary or the Commission from the base closing statute could be so significant that they would nullify the delegation of decisionmaking authority to the President and make his decision *ultra vires*. *Id.* at 408-09.

SUMMARY OF ARGUMENT

Nothing in *Franklin* reverses the presumption embodied in the APA that an agency's violations of its independent statutory obligations are judicially reviewable. Thus, even where the President makes a final decision on the merits, APA review is still available to determine whether an agency has violated its independent statutory mandates to conduct public hearings, prepare public reports and impact statements, make its records or meetings open to the public, or ensure public participation in its decisionmaking process leading to the President's decision. When an agency fails to comply with these obligations, its action is final and reviewable, and the courts have the power to remedy the agency's noncompliance, where that is possible. Indeed, the fact that the President's decision on the merits is unreviewable is more, not less, of a reason for the courts to assure that the agency complies with the statutory directives given it by Congress.

Franklin stands for the proposition, in keeping with other past precedent, that the merits of the President's base closing decision are not reviewable. In seeking to extend this principle to preclude review of the agencies' compliance with their statutory obligations, the government confuses the issue of reviewability and the appropriate remedy. As the Third Circuit recognized in its first decision, the fact that an agency has deviated from statutorily mandated procedures does not mean that the courts will invalidate the decision made as a result of the flawed process. The President's decisionmaking authority may further limit the available remedies, but that does not make the agencies' actions unreviewable.

ARGUMENT

THE ROLE OF THE PRESIDENT UNDER THE BASE CLOSING ACT DOES NOT RENDER UNREVIEWABLE CLAIMS THAT FEDERAL AGENCIES VIOLATED THEIR INDEPENDENT OBLIGATIONS UNDER THAT ACT OR OTHER PROVISIONS OF LAW.

Amicus agrees with the Third Circuit that nothing in *Franklin* means that the President's involvement in this and other similar decisionmaking processes eliminates APA review that would otherwise be available to determine whether federal agencies have complied with nondiscretionary statutory mandates. To understand why *Franklin* does not radically alter APA review in the way urged by petitioners, this brief begins by discussing the availability of judicial review and the APA's finality requirement prior to *Franklin*. It then explains how the *Franklin* decision flows from, and is consistent with, past jurisprudence. Finally, the brief describes the types of statutory claims against agencies that may still be reviewed under the APA pursuant to past practice and the rationale of *Franklin*, if not all of its language.

A. An Agency's Compliance with its Statutory Mandates is Presumptively Reviewable.

The APA was heralded by its drafters as ensuring that judicial review is available "to afford a remedy for every legal wrong." Senate Judiciary Committee, Administrative Procedure Act Report on S.7, 79th Cong., 1st Sess. (1945), *in Administrative Procedure Act: Legislative History* at 193, 304 (1946); *id.* at 325-26 (colloquy between Sen. McCarran & Sen. Austin); *id.* at 368 (statement of Rep. Walter). Thus, "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court

are subject to judicial review." 5 U.S.C. § 704.

In *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140-41 (1967), this Court construed this provision to embody a presumption of reviewability:

> [J]udicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress. Early cases in which this type of review was entertained have been reinforced by the enactment of the Administrative Procedure Act, which embodies the basic presumption of judicial review to one "suffering legal wrong because of agency action, or adversely affected or aggrieved within the meaning of a relevant statute."

Id. at 140 (quoting 5 U.S.C. § 702, APA standing requirement; citations omitted). *See also Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 681 (1986) ("We ordinarily presume that Congress intends the executive to obey its statutory commands and, accordingly, that it expects the courts to grant relief when an executive agency violates such a command").

Under this presumption, legislative silence is insufficient to preclude judicial review. As the House Judiciary Committee made clear, there must be "clear and convincing evidence of an intent to withhold" judicial review, and "[t]he mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold review." Report on S.7, 79th Cong., 1st Sess. (1945), *in APA Legislative History* at 275; *Dunlop v. Bachowski*, 421 U.S. 560, 567 (1975) (no clear and convincing evidence of legislative intent to preclude judicial review of agency decision there).

The APA spells out the circumstances in which the presumption of reviewability may be overcome. Section 701

creates exceptions to judicial review to the extent that a statute precludes review or commits the action to agency discretion by law. As explained by the Attorney General's Committee which was deeply involved in the development of the APA, judicial review is available under the APA "[i]f a party can show that he is 'suffering legal wrong'" and "legislation does not indicate that judicial review is precluded or withdrawn." *APA Legislative History* at 37-38; *see also* Appendix to Attorney General's Statement on Revised Committee Print (1945), *in APA Legislative History* at 229.

Congress envisioned that statutory preclusion of review would rarely be found:

> It has never been the policy of Congress to prevent the administration of its own statutes from being judicially confined to the scope of authority granted or to the objectives specified. Its policy could not be otherwise, for in such a case statutes would in effect be blank checks drawn to the credit of some administrative officer or board. The statutes of Congress are not merely advisory when they relate to administrative agencies, any more than in other cases.

House Judiciary Committee Report, *in APA Legislative History* at 275. Moreover, the APA's limitations on judicial review of matters committed to agency discretion are inapplicable to questions of law:

> Matters of discretion are necessarily exempted from the section, since otherwise courts would in effect supersede agency functioning. But that does not mean that questions of law properly presented are withdrawn from reviewing courts. . . . [W]here statutory standards, definitions, or other grants of power deny or require action in given situations or confine an agency within limits

> as required by the Constitution, then the determination of the facts does not lie in agency discretion but must be supported by either the administrative or judicial record.

Id. In other words, the APA's presumption of reviewability is at its zenith with respect to claims that an agency has exceeded its statutory authority or acted in contravention of the Constitution.

This is consistent with principles of judicial review preceding the enactment of the APA. Thus, as far back as *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163-65 (1803), this Court established the general proposition that, if a statutory right is violated, the aggrieved person has a remedy through a writ of mandamus to compel compliance with nondiscretionary statutory mandates. *See also Virginian Ry. Co. v. System Federation No. 40*, 300 U.S. 515, 545 (1937); *Work v. U.S. ex rel. Rives*, 267 U.S. 175, 177 (1925); *U.S. ex rel. Kansas City Southern Ry. Co. v. ICC*, 252 U.S. 178, 187 (1920); *Kendall v. United States*, 37 U.S. (12 Pet.) 524, 610-11 (1838). Outside the mandamus context, and prior to the APA, courts regularly reviewed claims that agencies exceeded their statutory authority. *Stark v. Wickard*, 321 U.S. 288 (1943) (deductions from milk producers fund allegedly contrary to statute); *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 110 (1902) (Court reviewed postmaster general's detention of mail without statutory authority).

The APA codifies this strong presumption of judicial review of agency compliance with statutory mandates. *See* 5 U.S.C. § 706(2)(A), (C) & (D). Therefore, under the APA, if a live controversy exists, if the parties seeking review have standing, and if Congress has not excluded a decision from judicial review, the federal courts are available to ensure agency compliance with statutory mandates.

B. The APA's Final Agency Action Requirement is Sufficiently Flexible to Permit Review of an Agency's Compliance with its Independent Statutory Mandates.

The APA's final agency action requirement is contained in the provision embodying the presumption of reviewability, not in the APA's exception to that presumption. The House and Senate Judiciary Committees equated "final agency action" with "effective or operative agency action for which there is no other adequate remedy in any court." House Judiciary Committee Report, *in APA Legislative History* at 277; Senate Judiciary Committee Report, *in APA Legislative History* at 213. Moreover, there is some indication that the final agency action requirement was designed simply "to negative any intention to make reviewable merely preliminary or procedural orders where there is a subsequent and adequate remedy at law available . . .." *APA Legislative History* at 37.

The other sentences of Section 704 further demonstrate that Congress was not trying to curtail judicial review of actions adversely affecting potential litigants. Thus, preliminary rulings are expressly made reviewable on review of the final agency action, and final actions are reviewable, even if they are under internal administrative appeal, unless the agency requires by rule that the action is inoperative pending further agency review. 5 U.S.C. § 704. Thus, the final agency action requirement delays judicial review until the agency has made its final decision or taken its final action on the matter at issue.

As a timing provision, Section 704's purpose is to avoid premature judicial involvement in the agency decisionmaking process, not to preclude review entirely. Where Congress has delegated decisionmaking authority to an agency, the courts are poorly equipped to review and defer to the agency's decision without a full administrative record, including a complete statement of the reasons for the

decision. R. Pierce, S. Shapiro, & P. Verkuil, *Administrative Law & Process* 182-83 (1985). Moreover, postponing judicial review until after the agency has made its final decision avoids unnecessary litigation. *See Kleppe v. Sierra Club*, 427 U.S. 390, 406 n.15 (1976); *Public Citizen v. Office of the U.S. Trade Representative*, 970 F.2d 916, 920 (D.C. Cir. 1992). None of these purposes is served by foreclosing judicial review once the agency has taken its final steps under a particular statutory mandate, *i.e.*, held a meeting in secret, issued a regulation without obtaining public comment, or failed to prepare a public report by the time required.

In the most definitive construction of the APA's final agency action requirement, *Abbott Laboratories* stated that agency action is defined broadly and that the finality requirement is to be interpreted in a pragmatic way. 387 U.S. at 149. The core question is whether the agency action is "definitive" as opposed to tentative, informal, or the ruling of a subordinate official. *Id.* at 151.[1]

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[1]In *Abbott Laboratories*, the Court discussed finality as part of its broader ripeness inquiry. 387 U.S. at 148-49. In that context, the Court concluded that the case was ripe because the regulation required immediate compliance by the petitioners, which gave them a sufficient interest to seek pre-enforcement review of it. *Compare Toilet Goods Association v. Gardner*, 387 U.S. 158 (1967) (regulation authorizing certain actions if a company refuses an inspection may never apply to petitioners, and thus the challenge will not be ripe until the regulation is applied). By focusing on whether the agency action affects the litigants' conduct, the ripeness analysis injects standing considerations into the inquiry. However, it does so in conjunction with the constitutional case or controversy requirement, not under the APA's finality requirement. *See also Lujan v. National Wildlife Federation*, 497 U.S. 871, 883, 891-93 (1990).

The focus of the finality inquiry has been on whether the agency has completed its decisionmaking process. Thus, where an agency has conducted an investigation, but not decided whether the facts adduced in that investigation warrant an agency enforcement action, there has been no final agency action, particularly where the factual results of the investigation may be challenged in a subsequent enforcement proceeding. *United States v. Los Angeles & Salt Lake RR Co.*, 273 U.S. 299 (1927). Similarly, the initiation of administrative enforcement proceedings is not a final agency action, because it is not a definitive statement of position, it has no legal force, and the entity has another remedy at law -- defending itself in, and challenging the propriety of, the enforcement proceeding. *FTC v. Standard Oil Co.*, 449 U.S. 232, 241-42, 245 (1980). In contrast, where an agency has promulgated a regulation that codifies its interpretation of a statute, its decision is final, particularly where private parties are required to adjust their conduct to comply with that interpretation. *Abbott Laboratories*, *supra*; *Gardner v. Toilet Goods Association, Inc.*, 387 U.S. 167 (1967); *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956); *CBS, Inc. v. United States*, 316 U.S. 407 (1942).

From *Abbott Laboratories* and its progeny, it follows that a tentative ruling, or one subject to authoritative reconsideration, is not final. *Abbott Laboratories*, 387 U.S. at 151; *National Automated Laundry & Cleaning Council v. Shultz*, 443 F.2d 689, 699-700 (D.C. Cir. 1971). Nor is the view of a subordinate official ordinarily considered a final action of the agency if there is likely be to review at higher levels of the agency. *Abbott Laboratories*, 387 U.S. at 151; *cf. NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975) (determining whether subordinate official had final decisionmaking authority for purposes of Freedom of Information Act exemption for predecisional agency deliberations); *Renegotiation Board v. Grumman Aircraft Engineering Corp.*, 421 U.S. 168 (1975) (same). In

contrast, the ruling of an agency head is presumptively final, in the absence of some indication that it is tentative. *National Automated Laundry*, 443 F.2d at 701. Similarly, a decision is likely to be considered final if it results from a formal process, such as notice and comment rulemaking, that is designed to take into account the views of outsiders and to state the agency's definitive interpretation. *Storer Broadcasting*, 351 U.S. at 198; *CBS*, 316 U.S. at 418; *National Automated Laundry*, 443 F.2d at 698-99; *see also Frozen Foods Express v. United States*, 351 U.S. 40 (1956) (administrative order exempting certain commodities from certificate requirements is final). Moreover, in contrast to an agency official's advisory opinion on a hypothetical question, an order is subject to APA review provided that it is not abstract, theoretical, or academic. *Cf. Helco Products Co. v. McNutt*, 137 F.2d 681 (D.C. Cir. 1943), *with Frozen Food Express*, 351 U.S. at 44. It follows from these cases that the final agency action requirement is met where the agency has taken all the steps that it must take to finalize its decision with respect to the particular action that is challenged.

Under this analysis, courts have routinely reviewed agencies' compliance with their specific statutory obligations. Thus, regulations are reviewable for procedural defects upon their promulgation, even before they have been applied to specific parties. *See, e.g., Public Citizen v. Nuclear Regulatory Commission*, 940 F.2d 679 (D.C. Cir. 1991). An agency's or an advisory committee's refusal to open a meeting to the public is reviewable once the decision to close the meeting has been made, without waiting for implementation of any decision made at the meeting. *ITT World Communications v. FCC*, 466 U.S. 463 (1984); *Common Cause v. NRC*, 674 F.2d 921 (D.C. Cir. 1982); *Public Citizen v. National Economic Commission*, 703 F. Supp. 1123 (D.D.C. 1989). In addition, an agency's failure to take an action required by statute is reviewable once the time for taking the action has allegedly past. Thus, courts

have reviewed claims that an agency has unreasonably delayed taking required actions. *See, e.g., Cutler v. Hayes*, 818 F.2d 879 (D.C. Cir. 1987); 5 U.S.C. § 706(1). Similarly, an agency's denial of a rulemaking petition, or its failure to suspend or cancel the registration of a hazardous pesticide, has been reviewed under the APA, even though there has been no "final" action in an affirmative sense. *WWHT, Inc. v. FCC*, 656 F.2d 807 (D.C. Cir. 1981); *Environmental Defense Fund, Inc. v. Hardin*, 428 F.2d 1093 (D.C. Cir. 1970); *Environmental Defense Fund, Inc. v. Ruckleshaus*, 439 F.2d 584 (D.C. Cir. 1971).

In sum, the final agency action requirement has never been construed to preclude APA review of a challenge to an agency's failure to take a statutorily mandated, nondiscretionary action, when the time for taking that action has past. If review of such violations is unavailable, it will not be because no final agency action has occurred, but rather because the controversy is not ripe, and therefore judicial review is inappropriate at that time, *see Toilet Goods*, *supra*, or because no party has standing under 5 U.S.C. § 702.

C. Pre-*Franklin* Judicial Review of Presidential Decisions and Related Agency Actions Has Followed This Pattern.

Although the courts have viewed most presidential actions to be discretionary and hence unreviewable, they have nonetheless been willing to decide whether the President has exceeded his statutory or constitutional authority, most notably in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). There, in order to avert a labor strike that would have stopped the production of steel needed for the Korean War effort, President Truman directed the Secretary of Commerce to take possession and operate the steel mills. The steel companies challenged the seizure, and this Court decided that the President also lacked the authority to seize the steel mills. First, it determined that Congress had not

authorized the seizure and, in fact, had specifically declined to authorize governmental seizures as a means of settling labor disputes. Then the Court decided that the President also lacked authority under the Constitution to order the seizure.

Similarly, in *Dames & Moore v. Regan*, 453 U.S. 654 (1981), this Court ruled that, as part of an agreement to release U.S. hostages held by Iran, the President had the statutory and constitutional power to nullify attachments on Iranian assets and to require the resolution of pending court claims against Iran through binding international arbitration. In both *Youngstown* and *Dames & Moore*, the plaintiffs sued federal agencies rather than the President, but the Court recognized that it was being called upon to decide whether the President had the authority to issue the underlying order. The fact that the President directed the agencies to take action did not insulate their actions from judicial review on the ground that the President had exceeded his authority.

Likewise, in *Dakota Central Telephone Co. v. South Dakota ex rel. Payne*, 250 U.S. 163, 181, 184 (1919), this Court held that the courts had no power to review whether the President abused his discretion in taking possession of telephone lines pursuant to a congressional delegation to him to do so "whenever he shall deem it necessary for the national security or defense." The Court did, however, review whether the President exceeded the authority granted by Congress, holding that he did not *Id.* at 184-85.

This approach to judicial review of presidential actions is consistent with the parameters initially established in *Marbury v. Madison* and later applied to a mandamus action to compel President Nixon to grant pay increases mandated by statute. *National Treasury Employees Union v. Nixon*, 492 F.2d 587 (D.C. Cir. 1974). Where a statute imposes a nondiscretionary obligation on the President, or expressly denies him certain authority, the courts have heard claims that the President has violated that statute.

In practice, such review has rarely been undertaken. This is because such statutory obligations are typically assigned to agency officials who are then sued directly. Where statutes assign authority to the President, they frequently leave the exercise of that authority to the President's discretion. *See, e.g., Dakota Central, supra.* Thus, even though, prior to *Franklin*, the courts, in keeping with the views of leading scholars, assumed that the APA applied to the President, they generally considered the President's actions within the exception to judicial review for actions committed to discretion by law. *See* K. Davis, *Administrative Law Treatise* at 275 (2d ed. 1984).

In the lead case holding presidential actions unreviewable, *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103 (1948), this Court decided that it had no authority under pertinent statutes to review the President's decision to grant or deny applications to air carriers to engage in overseas and foreign air transportation. Although the Civil Aeronautics Board conducted a hearing and made a recommendation to the President as to whether to grant a certificate to engage in such air transportation, the President had unconstrained statutory power to approve, modify, or deny any approval, denial, amendment, transfer, cancellation or suspension of such a certificate. In *Waterman Steamship*, the President had disapproved certain portions of the Board's recommendation, directed the Board to make specific changes because of unspecified "factors relating to our broad national welfare," and then approved a revised order that complied with his directions. Because there was no dispute that the President had unconstrained statutory authority to make such determinations, the Court held that the courts did not have the power to review orders of the Board that were issued entirely at the President's direction. Similarly, in *United States. v. George S. Bush & Co.*, 310 U.S. 371, 380 (1940), this Court held that the President's proclamation of changes in duty rates was unreviewable because the statute authorized

the President to approve tariff changes recommended by the Tariff Commission if "in his judgment" such changes were necessary to equalize differences in production costs.

In both *Waterman Steamship* and *Bush*, the presidential decision was predicated upon a recommendation made by an agency. Thus, in *Bush*, the Tariff Commission conducted a hearing and made findings upon which the President based his determination. The Civil Aeronautics Board in *Waterman Steamship* likewise conducted a hearing and made a recommendation to the President as to whether to grant a certificate to an air carrier to engage in foreign air transportation. Since the President had unfettered discretion to accept, reject, or modify the agencies' recommendations, the merits of those recommendations could not be reviewed.

Therefore, prior to *Franklin*, the courts did not review discretionary actions of the President, but they did review claims that the President had exceeded his statutory or constitutional authority. To prevent circumvention of the former principle, judicial review of an agency's recommendations for presidential action was precluded if the President's decision was not subject to judicial review. However, this Court has never held that a President's decision to undertake a particular action alone insulates an agency's implementation of that decision from judicial review. Thus, not only have the courts decided whether the President has exceeded his authority, but they have also, for example, routinely decided whether agencies have complied with their independent obligations under the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332, to prepare environmental impact statements with respect to their implementation of presidential decisions. *See, e.g., Romer v. Carlucci*, 847 F.2d 445 (8th Cir. 1988) (*en banc*) (deployment of MX missiles pursuant to presidential basing recommendation approved by Congress); *Wisconsin v. Weinberger*, 745 F.2d 412 (7th Cir. 1984) (submarine communications system President decided to deploy); *Sierra Club v. Adams*, 578 F.2d 389 (D.C. Cir. 1978) (U.S.

participation in construction of Pan American highway pursuant to international agreement); *Greenpeace USA v. Stone*, 748 F. Supp. 749 (D. Haw. 1990), *appeal dismissed as moot*, 924 F.2d 175 (9th Cir. 1991) (removal of chemical weapons from Germany pursuant to presidential agreement). In short, the fact of presidential involvement alone has never been a basis for the elimination of all judicial review of an agency's actions.

D. *Franklin* Applied Existing Reviewability Principles Without Further Limiting the Reviewability of Agency Actions.

In *Franklin v. Massachusetts*, 112 S. Ct. 2767 (1992), this Court construed the respective statutory roles of the President and the Secretary of Commerce in determining how to count overseas citizens in the decennial census. Under the automatic reapportionment statute, the Secretary undertakes the decennial census and submits a report with the results of the census to the President. 13 U.S.C. § 141(a) & (b). The President thereafter must submit to Congress a statement of the census results and the number of Representatives to which each state is entitled under a prescribed method of calculation. 2 U.S.C. § 2(a). The State of Massachusetts had sought to have the President's census submission set aside on the grounds that the Secretary's report, on which that submission was based, was arbitrary and capricious.

This Court concluded that the statute gave the President final decisionmaking authority with respect to the decennial census calculations that he transmitted to Congress, and that the Secretary simply made a recommendation to him. 112 S. Ct. at 2773-75. On that basis, and because the Court held that the President is not an agency subject to APA review, Massachusetts could not obtain APA review of the

Secretary's census report. *Id.* at 2773-76.[2]

Under the majority's construction of the census statute, *Franklin* is neither new nor controversial. Rather, it follows from the rationale of *Bush*, *Waterman Steamship*, and *Dakota Central*: Where a statute vests the President with discretionary authority, his exercise of that authority is not reviewable for abuse of discretion.

Similarly, *Franklin* hardly revolutionizes the legal landscape in holding that the APA provides no basis for substantive review of agency recommendations to the President under such a statute. *Waterman Steamship* and *Bush* held long ago that review of the merits of such recommendations is unavailable where the statute gives the President final unreviewable discretion. In holding that an agency recommendation to the President cannot be challenged as a means to set aside the President's decision, *Franklin* is entirely consistent with past jurisprudence.

Moreover, for the most part, *Franklin* applied the criteria that had been used previously to determine whether an agency's action is final. Thus, the majority asked whether the agency had completed its decisionmaking process, whether the Secretary's census report was a tentative recommendation, rather than a final, binding determination, and whether the report was the action of a subordinate official, subject to revision by a superior. 112 S. Ct. at 2773-75. Applying these factors, the Court concluded that, although the census report was the culmination of the agency's decisionmaking process, it made recommendations

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[2]Four Justices did not join that part of the decision because they concluded that the statute did not give the President discretion to modify the census results reported by the Secretary. Hence, those Justices concluded that the Secretary's report is a final agency action subject to APA review. *Id.* at 2779-83.

that were subject to revision by the President, and thus its calculations were a moving target prior to the time the President acted. *Id.* at 2774-75. Since the case challenged the census calculations, the Court held that "the final action complained of is that of the President." *Id.* at 2773.

The majority opinion also stated that review is not available unless "the result of [the agency's decisionmaking] process is one that will directly affect the parties." *Id.* This requirement is hardly controversial where, as in *Franklin*, the President has decisionmaking power and substantive review is sought of agency recommendations to him.

In other contexts, however, such as where review is sought of an agency's independent procedural obligations that do not directly involve the substantive outcome of the agency's actions, this phrase in *Franklin* commingles the APA's finality requirement with standing, ripeness, and mootness issues, in a way that might inappropriately preclude review. It need not lead to that result if the challenged action is properly understood, and if the effects on the parties are addressed in a proper manner. Thus, the correct approach, as recently articulated by this Court, is that APA review is available for an agency's failure to adhere to its independent procedural obligations without requiring any showing that compliance with the obligations would change the agency's substantive outcome. *See Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2142-43 n.7 (1992) (a party may assert violations of procedural rights without meeting normal standing requirements for redressability and immediacy). Under this approach, as demonstrated in the following section, the courts may undertake APA review of various challenges under the Base Closing Act, as well as of analogous requirements imposed under other statutes, even though the ultimate decision on the merits is made by the President or someone else who is not subject to APA review.

E. An Agency's Compliance with its Independent Statutory Obligations is Still Reviewable After *Franklin*, Even Where the President is the Ultimate Decisionmaker.

Prior to *Franklin*, this Court consistently held that the President's exercise of discretionary decisionmaking power could not be reviewed by the courts. *See supra* at 15-18. Although the Court did so generally by finding a statutory delegation of discretionary authority, or that the matter was committed to presidential discretion by law, *Franklin* reached the same result through its holding that the President is not an agency under the APA.

Under these principles, the merits of the base closing decision are unreviewable because the President has unfettered discretion under the base closing statute to decide whether to approve the Commission's recommendations. That much is not disputed. The question is whether *Franklin* stands in the way of judicial review of compliance by the Secretary and the Commission with their independent procedural obligations in developing the recommendations that are sent to the President for his approval. Or, to put the matter more starkly, does *Franklin* mean that the courts should have summarily dismissed *Youngstown*, *Marbury*, or *Dames & Moore*?

Such a result is wholly unwarranted because the APA embodies a more limited approach to preclusion of judicial review. Under the APA's exceptions to judicial review, review of agency actions is barred only "*to the extent that* statutes preclude judicial review or agency action is committed to agency discretion by law." 5 U.S.C. § 701(a) (emphasis added); *see John Hancock Mutual Life Insurance Co. v. Harris Trust & Savings Bank*, 62 U.S.L.W. 4025, 4031 (S.Ct. Dec. 14, 1993). By analogy, where a statute assigns decisionmaking authority to the President, judicial review should be precluded *only to the extent* of that statutory assignment. In other words, the fact that the

President has ultimate decisionmaking authority should not foreclose judicial review of agency actions that are independent of the matters assigned to the President.

This approach is followed under the Freedom of Information Act ("FOIA"), which provides a public right of access to "agency records," but not to records in the possession of the President. Despite the exclusion for presidential record, all records created by agencies are subject to the Act, even if they are closely connected to a presidential function, such as the nomination of federal judges, or if they are created by an agency at the President's request. *See Ryan v. Department of Justice*, 617 F.2d 781 (D.C. Cir. 1980); *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971). A contrary approach would permit the presidential exclusion to swallow up FOIA's coverage. *See also Armstrong v. Executive Office of the President*, 1 F.3d 1274 (D.C. Cir. 1993) (basis for treating records as presidential records is subject to judicial review, even though judicial review is precluded of treatment of properly designated presidential records). For the same reasons, the exclusion of the President from the APA does not eviscerate the APA's broad presumption of reviewability of agency actions. Judicial review is still available to determine whether an agency has complied with its independent statutory obligations, even where, as in *Franklin*, the merits of the agency's recommendation and the President's decision are not subject to judicial review.

By way of example, if the census statute had required the Secretary of Commerce to publish a report when she gave her advice to the President, and the Secretary did not make her report public, surely the courts could, under the APA, have reviewed a challenge to that violation of the statute. Similarly, despite the contrary suggestion in the Third Circuit's first opinion, 971 F.2d at 945-46, 948, a member of the public who wanted to attend a hearing of the Base Closing Commission could bring a lawsuit under the APA challenging the Commission's plan to close a

forthcoming hearing in violation of the base closing statute, § 2903(d). Likewise, if the Secretary of Defense developed the base closing selection criteria without publishing a proposal in the Federal Register, providing an opportunity for public comment, or publishing the final criteria, as required under the base closing statute, *id.* § 2903(b), the fact that the President makes the final base closing decision would not preclude judicial review of those failures.

In these respects, many of the obligations imposed by the base closing statute on the Secretary and the Commission are analogous to those imposed on agencies by other statutes of general applicability. Thus, the process of developing the base-closing selection criteria is analogous to the APA's notice and comment rulemaking requirements, 5 U.S.C. § 553, and the Commission's open meeting mandate is similar to the open meeting requirements of the Government-in-the-Sunshine Act and the Federal Advisory Committee Act ("FACA"). 5 U.S.C. § 552b & App. 2. In addition, the publication requirements for the Secretary's selection criteria and base closing recommendations resemble the affirmative disclosure requirements of the FOIA. 5 U.S.C. § 552(a).

These general statutes impose independent obligations on federal agencies. When an agency fails to comply, its action is final, and no action by a subsequent decisionmaker, be it the President or Congress or even another agency, will, as a matter of course, correct that error. Moreover, the action complained of is the agency's failure to make its report public, to publish its decision, or to open a hearing or meeting to the public, and the agency's action directly affects the parties by depriving them of information or access to which they have a statutory right. Accordingly, violations of those kinds of statutory obligations are reviewable, even under the finality test enunciated in *Franklin*.

This logic applies to other statutory procedures governing an agency's development of recommendations. For example, FACA requires federal agencies to adhere to

certain procedures when they obtain advice from federal advisory committees. In *Public Citizen v. Department of Justice*, 491 U.S. 440 (1989), the plaintiffs sought to compel the Department of Justice to comply with those procedures when it obtained advice to transmit to the President on potential judicial nominees. No one remotely suggested that the President's constitutional role in nominating judges transformed the agency's noncompliance with its independent statutory obligations under FACA into a tentative or otherwise nonfinal action excluded from APA review. Indeed, if it had that effect, this Court could have avoided deciding very difficult statutory and constitutional issues.

Similarly, NEPA requires federal agencies to "include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment" an environmental impact statement ("EIS") of the proposed action. This mandatory obligation is imposed on federal agencies in connection with their recommendations on proposed actions, even if some other agency or the President or Congress will decide whether to adopt the proposal. *See, e.g., Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989) (Court reviewed NEPA compliance with respect to agency permit for development even though agency had to approve subsequent development plan before construction could begin). Indeed, NEPA expressly applies to agency recommendations on proposals for legislation, even though it is the President who has the constitutional authority to recommend legislation to Congress. U.S. Const. art. II, § 3, cl. 1.

Nothing in NEPA provides the slightest hint that Congress intended to exclude legislative EISs or other EISs involving presidential decisions from judicial review. To the contrary, when Congress has wanted to preclude judicial review of NEPA claims with respect to specific presidential actions, it has done so expressly through statutory exemptions. *See, e.g.*, Department of Defense

Appropriations Act of 1983, Pub. L. No. 97-377, 96 Stat. 1847-48 (1982) (MX missile basing system). Indeed, the base closing statute at issue here contains such an express exemption from NEPA for the President's base closing decision and recommendations of the Commission and the Secretary. Act, § 2905(c). The legislative history of that provision makes clear that the exemption was prompted by problems caused by judicial review of past NEPA claims. H.R. Conf. Rep. No. 1017, 100th Cong., 2d Sess. at 23 (1988). Yet, the exemption would plainly be unnecessary if judicial review were precluded due to *Franklin* and the President's decisionmaking role.

For more than two decades, the courts have consistently construed NEPA and the APA to allow judicial review, regardless of whether the underlying action involves a legislative proposal or some other presidential authority. They have done so based on one of this Court's early NEPA cases, *Kleppe v. Sierra Club*, 427 U.S. 390, 406 n.15 (1976), which established the time for judicial intervention as "when the report or recommendation on the proposal is made, and someone protests either the absence or the adequacy of the final impact statement." Thus, it is the agency's issuance of its report or recommendation, not when that recommendation takes effect, that is the occasion for judicial review.[3]

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[3]For legislative EISs, *see Trustees for Alaska v. Hodel*, 806 F.2d 1378 (9th Cir. 1986); *Izaak Walton League v. Marsh*, 655 F.2d 346, 365 (D.C. Cir.), *cert. denied*, 454 U.S. 1092 (1981); *Realty Income Trust v. Eckerd*, 564 F.2d 447 (D.C. Cir. 1977); *Natural Resources Defense Council v. Lujan*, 768 F. Supp. 870 (D.D.C. 1991).

For EISs on requests for appropriations, *see, e.g.*, *Andrus v. Sierra Club*, 442 U.S. 347 (1979); *Environmental Defense Fund v. Tennessee Valley Authority*, 468 F.2d 1164 (continued...)

Nothing in *Franklin* changes this approach to NEPA judicial review. As this Court recognized in *Kleppe*, the agency has taken its final action its final action for purposes of NEPA once it has made its report or recommendation on a proposal without an EIS or with an inadequate one. At that time, the agency has completed its decisionmaking process, and no subsequent actions of the President, the Congress, or anyone else, except a court, can correct any deficiencies. Litigants who satisfy the APA's standing requirement, *i.e.*, they are aggrieved within the meaning of NEPA, will also satisfy the *Franklin* requirement that they be directly affected by the agency's NEPA violations, most often because those violations deprive them of statutorily mandated information on an action that may cause them harm, if implemented. Assuming implementation is still a possibility, and not yet completed, *i.e.*, the case is ripe and not yet moot, APA review is available.[4]

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[3](...continued)
(6th Cir. 1972).

For agency recommendations for legislative designation of wilderness areas, including those required by statute to be submitted by the President, *see, e.g., Idaho Conservation League v. Mumma*, 956 F.2d 1508 (9th Cir. 1992); *California v. Block*, 690 F.2d 753 (9th Cir. 1982).

For EISs in connection with presidential military or foreign affairs decisions, *see supra* at 18-19.

[4]One post-*Franklin* case confirmed that APA review is available for an agency's refusal to prepare a supplemental EIS on its recommendations for wilderness designations, even though the President has statutory authority to submit such designations to Congress, and Congress must pass a law affording wilderness protection. *Colorado Environmental Coalition v. Lujan*, 803 F. Supp. 364, 370 (D. Colo. 1992). (continued...)

Nor does *Franklin* eliminate judicial review of NEPA cases or other cases seeking agency compliance with their independent statutory obligations, even where those obligations are part of the process leading to the development of recommendations for the President. APA review is available, as long as the case is not, in fact, seeking review of the President's decision or of the merits of the agency's recommendations. Although the President's action may render a controversy moot, it does not eliminate judicial review of agency actions that are final and still present a live controversy.

However, the fact that those actions are reviewable under the APA does not mean that violations will automatically result in setting aside the President's decision. Once a court finds a violation of an agency obligation, it would then determine the appropriate remedy. *Harper v. Virginia*, 113 S. Ct. 2510, 2519-20 (1993). Certainly, the court could order the preparation or release of an agency report. A court could also direct an agency to open a future hearing, or it could order the release of a transcript of an improperly closed hearing. In addition, a court could declare and even direct that the agency must comply with notice and comment rulemaking procedures or prepare an EIS.

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[4](...continued)
By contrast, another case brought by *amicus* Public Citizen held (incorrectly in our view) that the Office of the U.S. Trade Representative's decision not to prepare an EIS on the North American Free Trade Agreement ("NAFTA") is not subject to APA review because the court deemed the NAFTA itself to be the challenged action, rather than the Office's recommendation on the NAFTA, and because the decision to enter into the NAFTA is a presidential, not an agency, action. *Public Citizen v. Office of the U.S. Trade Representative*, 5 F.3d 549 (D.C. Cir. 1993), *cert. pending*, No. 93-560.

However, where the President makes the ultimate decision, a court might well decide that a particular statutory violation by an agency does not warrant setting aside the President's decision. *See* 5 U.S.C. § 552b(h)(2) (courts may not set aside or enjoin underlying agency action based on Sunshine Act violation).[5]

At the same time, the courts might properly set aside a decision (even if made by the President) where it is in excess of statutorily delegated authority. Thus, if, in direct contravention of the statute, the President added a base to the Commission's recommendations and certified and transmitted his list to Congress, and if Congress failed to act within the allotted time, surely the courts could enjoin closure of the added base because the President exceeded his statutory authority by adding it to the list. Similarly, if the Secretary and the Commission completely disregarded the entire statutory scheme and simply transmitted an old Department of Defense base closing list to the President, or picked names of bases randomly out of a hat, without complying with any part of the process prescribed in the Base Closing Act, the statutory violations might be so fundamental that the President would no longer have the authority under the statute to make the recommendations effective.

Amicus takes no position on whether the statutory violations alleged by respondents here would, if proven, so

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[5]Because compliance with procedural requirements may be ensured most effectively, and with the least interference with the base closing decisionmaking process, prior to completion of that process, *e.g.*, by ordering that public hearings be held, rulemaking procedures be followed, or records be made available, *amicus* disagrees with the conclusion of the Third Circuit in its first decision that judicial review of alleged violations of such provisions is unavailable until after the President makes his decision. 971 F.2d at 945-46, 948.

infect the decisionmaking process that they eviscerate the President's decisionmaking power. Rather, we contend that, even if the President's discretion is not constrained by the statutory procedures, the agencies' compliance with their independent statutory obligations is subject to APA review, although possibly without the relief that respondents ultimately seek.

CONCLUSION

For the reasons set forth above, the judgment below should be affirmed.

Respectfully submitted,

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